Supreme Court, U.S.
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No. 96-432

In The

Supreme Court of the United States

October Term, 1996

DENISE SANDERS, YOLANDA WHATLEY, and WANDA WALKER,

Petitioners,

v.

VENTURE STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the question of whether the doctrine of res judicata bars an action asserting breach of employment contract claims arising from the termination of an employee's employment where there is a previous judgment on the merits in a prior action asserting discrimination claims arising from the termination of the employee's employment.

PARTIES TO THE PROCEEDING

The petitioners are Denise Sanders, Yolanda Whatley, and Wanda Walker, all former employees of the respondent, Venture Stores, Inc.

The respondent is Venture Stores, Inc., a Missouri corporation with its principal place of business in Missouri. The respondent is in the business of retail sales of consumer goods.

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RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Respondent, VENTURE STORES, INC. (hereinafter referred to as "Venture"), by and through its attorneys, Seyfarth, Shaw, Fairweather & Geraldson, hereby files its brief in opposition to the petition for writ of certiorari filed by Petitioners Denise Sanders, Yolanda Whatley, and Wanda Walker (hereinafter referred to collectively as the "Plaintiffs").

By way of summary, in 1994, Plaintiffs brought a federal court action alleging that the termination of their employment by Venture violated Title VII of the Civil Rights Act of 1964, as amended. 42 U.S.C. § 2000e *et seq.* Judgment was granted to Venture in that suit based on the limitations period provided in 42 U.S.C. § 2000e-5(f)(1). Subsequently, Plaintiffs brought a state law action for breach of contract challenging the termination of their employment. This subsequent action was dismissed on res judicata grounds.

Res judicata bars a breach of contract action brought by former employees challenging the termination of their employment where there is a judgment on the merits between the same parties in a previous Title VII discrimination action which also challenged the termination of their employment. The Seventh Circuit's decision appropriately affirmed the dismissal of the second action brought by Plaintiffs against Venture. The decision below follows the precedent of the Supreme Court, presents no conflict with a decision of another United States court of appeals, and does not depart from the accepted and usual

course of judicial proceedings. Accordingly, the Court should deny the petition for writ of certiorari.

STATEMENT OF THE CASE

On February 24, 1994, Plaintiffs brought suit against Venture alleging that Venture's termination of their employment violated Title VII. Venture's answer to the complaint presented as an affirmative defense Plaintiff's failure to file suit within 90 days after receipt of right to sue letters from the Equal Employment Opportunity Commission ("EEOC") as required by 42 U.S.C. § 2000e-5(f)(1). On July 7, 1994, Venture filed a motion for summary judgment based on Plaintiffs' failure to file suit within this limitations period.

On August 31, 1994, "after discovery was completed, after Venture had filed its motion for summary judgment, after the district court indicated its inclination to grant the summary judgment and after it referred the matter to a magistrate judge," Plaintiffs filed a motion to amend their complaint to add several new counts, including state law breach of contract claims. *See Sanders v. Venture Stores, Inc. ("Sanders I")*, 56 F.3d 771, 775 (7th Cir. 1995). On October 24, 1994, the District Court granted summary judgment to Venture under Fed. R. Civ. P. 56, and denied the Plaintiffs' motion to amend their complaint. Plaintiffs subsequently appealed the District Court's denial of their motion to amend.

The Seventh Circuit affirmed the District Court in *Sanders I*, 56 F.3d 771 (7th Cir. 1995). The Seventh Circuit found that amendment of the complaint at the time it was

filed would have compelled Venture "to incur additional discovery costs, and there would be undue delay and prejudice to the parties and to the court." *Id.* at 775. Accordingly, consistent with the Supreme Court's decision in *Foman v. Davis*, 371 U.S. 178, 83 S. Ct. 227 (1962), the Seventh Circuit found that denial of the motion to amend was a proper exercise of the District Court's discretion and affirmed the judgment.

On June 7, 1995, two weeks after the Seventh Circuit issued its decision in *Sanders I*, Plaintiffs filed a new action in Illinois state court asserting breach of contract claims based on the termination of their employment. These were the same claims for which amendment had been ruled untimely in *Sanders I*. Venture removed the new action to federal court on the basis of diversity jurisdiction, and filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) on the grounds of res judicata. Relying on the Seventh Circuit's decisions in *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988), and *Brzostowski v. Laidlaw Waste Systems*, 49 F.3d 337 (7th Cir. 1995), the District Court agreed and dismissed the second complaint, concluding that Plaintiffs should "not now be afforded a second bite at the apple." *Sanders v. Venture Stores, Inc.*, 899 F. Supp. 387, 389 (N.D. Ill. 1995).

Plaintiffs again appealed to the Seventh Circuit. This time they asserted that the doctrine of res judicata should not apply to bar their subsequent action, because in their earlier action they were denied leave to amend their complaint to add the contract claims. In rejecting Plaintiffs' arguments, the Seventh Circuit held that the new suit plainly met the three elements of res judicata, or

claim preclusion: (1) a judgment on the merits in the earlier action, (2) an identity of parties in the two suits, and (3) an identity of the claims in the two suits. *Sanders v. Venture Stores, Inc. ("Sanders II")*, Docket No. 95-3743, Slip Op. at 2 (7th Cir., April 8, 1996). Further, the Seventh Circuit rejected Plaintiffs' effort to carve an exception to the res judicata doctrine as contrary to settled precedent in the circuit, specifically *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361 (7th Cir.), *cert. denied*, 488 U.S. 856 (1988), and *Brzostowski v. Laidlaw Waste Systems*, 49 F.3d 337 (7th Cir. 1995). In so doing, the Seventh Circuit observed that Plaintiffs' inability to litigate their contract claims was attributable only to their own "fail[ure] to consider what claims they *could* have brought . . . when the case was originally filed." *Sanders II*, Slip Op. at 3 (italics in original). Accordingly, the Seventh Circuit affirmed the judgment of the District Court.

Plaintiffs now petition for writ of certiorari of the decision in *Sanders II*.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FOLLOWED THE CONTROLLING PRECEDENT OF THE SUPREME COURT.

The doctrine of res judicata as developed by the United States Supreme Court provides that "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411, 414 (1980); *see also Federated*

Department Stores, Inc. v. Moitie, 452 U.S. 394, 398, 101 S. Ct. 2424, 2428 (1981). An action will be barred by res judicata where the following three elements are present: (1) a judgment on the merits in an earlier action; (2) an identity of parties or privies in the two suits; and (3) an identity of the cause of action between both suits. *Id.* at 399, 101 S. Ct. at 2428; *see also Wade v. Hopper*, 993 F.2d 1246, 1252 (7th Cir.), *cert. denied*, 510 U.S. 868, 114 S. Ct. 193 (1993); *Shaver v. F. W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir.), *cert. denied*, 488 U.S. 856, 109 S. Ct. 145 (1988).

In the present case, the Seventh Circuit applied each of these elements to find that Plaintiffs' new complaint was barred by the res judicata doctrine. *Sanders II*, Slip Op. at 2. Plaintiffs presented no argument below that these elements were not present, and do not now argue that the Seventh Circuit erred in so finding.

The Supreme Court has repeatedly reaffirmed the importance of the doctrine of res judicata in the American system of justice. As stated by the Court in *Allen v. McCurry*, "res judicata . . . relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." 449 U.S. at 94, 101 S. Ct. at 415 (1980); *see also Brown v. Felsen*, 442 U.S. 127, 131, 99 S. Ct. 2205, 2209 (1979). Accordingly, the Court has strongly rejected efforts by the lower federal courts to carve out policy-based exceptions to the doctrine of res judicata – holding instead that public policy is best served by application of the rule where the elements are present. *See, e.g., Moitie*, 452 U.S. at 399-401, 101 S. Ct. at 2438-40 (1981); *see also Shaver*, 840 F.2d at 1364 (7th Cir.

1988) ("Once a litigant has satisfied the prongs of the test, a later suit should be barred since there is little, if any, room left for making further policy arguments.").

In the present case, Plaintiffs seek an exception to the application of the res judicata doctrine in cases where a party attempts but fails to advance a claim in the earlier litigation. The Court should decline to entertain the creation of such an exception, and deny the petition for writ of certiorari.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEAL AS TO THE APPLICATION OF THE RES JUDICATA DOCTRINE.

(A) An Action Brought To Contest An Employee's Discharge Is Barred By A Previous Action Which Contested The Discharge.

For purposes of res judicata, a claim in a second suit is considered the "same claim" as one brought in an earlier suit if it arises from the "same transaction" or "a single core of operative facts." *See Kale v. Combined Insurance Co. of America*, 924 F.2d 1161, 1167 (1st Cir.), *cert. denied*, 502 U.S. 816, 112 S. Ct. 69 (1991); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38-39 (2d Cir. 1992), *cert. denied*, 506 U.S. 1053, 113 S. Ct. 977 (1993); *Lubrizol Corp. v. Exxon Corp.*, 929 F.2d 960, 963 (3d Cir. 1991); *In re Varat Enterprises*, 81 F.3d 1310, 1316 (4th Cir. 1996); *In re Air Crash at Dallas/Ft. Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988); *J.Z.G. Resources, Inc. v. Shelby Insur. Co.*, 84 F.3d 211, 215 (6th Cir. 1996); *Shaver*, 840 F.2d 1361, 1365 (7th Cir. 1988); *In re International Nutronics, Inc.*, 28 F.3d 965, 970-71 (9th Cir. 1994); *Robinson v. Volkswagenwerk AG*, 56 F.3d 1268,

1275 (10th Cir. 1995); *see also Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481, 102 S. Ct. 1883, 1896 n.22 (1982) (noting the then-recent trend of applying res judicata "to bar claims arising from the same transaction even if brought under different statutes").

There is no conflict among the federal courts of appeal that the various claims an employee might raise relative to the termination of her employment arise out of the same transaction or core of operative facts and thus constitute a single cause of action for res judicata purposes. *See, e.g., Kale v. Combined Insur. Co. of America*, 924 F.2d 1161 (1st Cir. 1991); *Woods v. Dunlop Tire Corp.*, 972 F.2d 36 (2d Cir. 1992); *Hogue v. Royse City, Texas*, 939 F.2d 1249 (5th Cir. 1991); *Cemer v. Marathon*, 583 F.2d 830 (6th Cir. 1978); *Shaver*, 840 F.2d 1361 (7th Cir. 1988); *Brzostowski*, 49 F.3d 337 (7th Cir. 1995); *Mills v. Des Arc Convalescent Home*, 872 F.2d 823 (8th Cir. 1989); *Clark v. Haas Group, Inc.*, 953 F.2d 1235 (10th Cir.), *cert. denied*, 506 U.S. 832, 113 S. Ct. 93 (1992).

(B) No Exception To The Res Judicata Doctrine Is Created By An Attempted, But Failed Effort To Bring Claims In An Earlier Action.

"Res judicata bars not only those issues which were actually raised in a prior suit, but also all issues which could have been raised in that action." *Brzostowski v. Laidlaw Waste Systems, Inc.*, 49 F.3d 337, 338 (7th Cir. 1995) (citing *Shaver v. F.W. Woolworth Co.*, 840 F.2d 1361, 1364 (7th Cir. 1988)). In the decision below, the Seventh Circuit merely reaffirmed this rule of law, stating that Plaintiffs could have brought their contract claims in the earlier

action but failed to do so because they "failed to consider what claims they *could* have brought . . . when the case was originally filed." *Sanders II*, Slip Op. at 3 (italics in original). Plaintiffs agree with the Seventh Circuit's statement of the applicable rule of law. *Petition for Writ of Certiorari* at 2. Nonetheless, they argue that the rule should not apply, because they attempted in the first suit to raise the contract claims advanced in the second suit.

Plaintiffs omit the important fact that, while they *attempted* to raise their contract claims by a motion to amend their first complaint, they *failed* in this effort. Plaintiffs ignore the decision of the Seventh Circuit in *Sanders I* that their attempt was inexcusably delayed and would have caused undue prejudice to Venture and the courts. *See Sanders I*, 56 F.3d 771, 774 (1995). As stated by the Seventh Circuit in *Sanders II*, Plaintiffs could have avoided the denial of their motion to amend in *Sanders I* (and avoided the predicament in which they find themselves) had they not "failed to consider what claims they could have brought based upon the court's independent diversity jurisdiction when the case was originally filed." *Sanders II*, Slip Op. at 3. Plaintiffs acted at their peril by waiting to seek leave to amend their complaint until after discovery closed, after Venture filed its motion for summary judgment, and after the District Court expressed its inclination to grant the summary judgment. The mere fact, however, that Plaintiffs "bollixed [their] opportunity by . . . failing to prosecute [their case] properly does not justify exposing the defendant to another round." *American National Bank & Trust Co. v. City of Chicago*, 826 F.2d 1547, 1553 (7th Cir.), *cert. denied*, 484 U.S. 977, 108 S. Ct. 489 (1987).

In this regard, the Seventh Circuit's decision in this case is wholly consistent with prior decisions in *Shaver*, 840 F.2d 1361 (7th Cir. 1988), and *Kale*, 924 F.2d 1161 (1st Cir. 1991). In *Shaver*, the plaintiff-employee initially brought suit asserting federal age discrimination and pendent state law claims. The age discrimination claim was subsequently dismissed as untimely. Further, the plaintiff had failed to raise diversity as a jurisdictional basis for the state law claims, and the federal district court declined to exercise pendent jurisdiction over the state law claims. Subsequently, the plaintiff-employee brought a new breach of contract claim in Wisconsin state court. The employer removed the action to federal district court on diversity grounds, and the district court granted judgment to the employer on the contract claim.

On review, the Seventh Circuit affirmed on res judicata grounds, holding that both the contract and the discrimination claims arose out of "the same core of operative facts" (i.e., the employer's liquidation and the employee's layoff), and thus "constitute[d] identical causes of actions for res judicata purposes." *Shaver*, 840 F.2d at 1365. As emphasized by the Seventh Circuit, "res judicata operates as a bar to the litigation of matters which could have been raised in a prior proceeding . . . [and] prevents the splitting of a single cause of action and the use of several theories of recovery as the basis for separate suits." *Id.* at 1365. The Seventh Circuit further rejected plaintiff's efforts to argue that the res judicata doctrine should not apply because of policy concerns. *Id.* at 1365-66. Contrary to plaintiff's assertions, the Seventh Circuit (echoing the Supreme Court) emphasized the important policies that the res judicata doctrine

upholds and found that the new action was barred by "both the strict test of and the policy behind the res judicata doctrine." *Id.* at 1367-68.

Likewise, in almost identical circumstances in *Kale*, 924 F.2d 1161 (1st Cir.1991), the United States Court of Appeals for the First Circuit held that a judgment in one federal suit will act as res judicata as to a later suit asserting state law claims where the plaintiff tried, but failed, to assert the state law claims in the first suit. In *Kale*, the plaintiff-employee first filed suit in federal court pleading federal jurisdiction and alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* To this suit, he added several state law claims asserting only pendent jurisdiction. Subsequently, plaintiff's federal age discrimination claim was held to be time-barred. Accordingly, the district court granted summary judgment to the defendant-employer on that claim, and dismissed "without prejudice" the pendent state law claims. *Id.* at 1163.

After plaintiff's unsuccessful appeal of the adverse judgment on his age discrimination claim, he then filed a new suit in Massachusetts state court alleging "a tsunami of state-law claims." *Id.* at 1164. The defendant-employer removed the suit to federal district court on diversity grounds, and moved to dismiss based on the res judicata effect of the first litigation. The district court granted the motion to dismiss.

On review, the First Circuit found that the three elements of the res judicata doctrine had been met — a judgment on the merits, an identity of parties, and an identity of causes of action. *Id.* at 1165-66. In the latter

regard, the court found that all of the claims in the second suit arose from "the same transactional hub" as in the first suit (i.e., "defendant's unilateral termination of the plaintiff's employment"), and thus there was an identity of causes of action for res judicata purposes. *Id.* at 1166. Relying on the Seventh Circuit's decision in *Shaver*, the First Circuit accordingly affirmed the district court's judgment below, "holding that when a plaintiff pleads a claim in federal court, he must, to avoid the onus of claim-splitting, bring all related state claims in the same lawsuit so long as any suitable basis for subject-matter jurisdiction exists." *Id.* at 1165, 1166-67. Rejecting the plaintiff's plea that such application of the res judicata doctrine resulted in an injustice to him, the First Circuit aptly opined, "[t]here is no unfairness . . . in declining to extricate the plaintiff from a self-dug hole." *Id.* at 1167.

The fact that Plaintiffs belatedly attempted to amend their complaint in *Sanders I* to bring their contract claims does not aid their cause. Rather, Plaintiffs in this case stand in shoes much like those of the plaintiffs in *Shaver* and *Kale*.

Here, the District Court granted judgment to Venture on federal discrimination claims and properly rejected the plaintiffs' efforts to bring state law claims as part of the initial action. In *Shaver* and *Kale*, the district courts granted judgment to the defendant-employers on federal discrimination claims and properly dismissed the plaintiffs' state law claims. In the present case, Plaintiffs were unable to assert their contract claims in the first action because their motion to amend was untimely. In *Shaver* and *Kale*, the plaintiffs were unable to bring their state law claims in the first action because they failed to timely

assert an appropriate jurisdictional basis for the district court to entertain such claims.

Here, as in *Shaver* and *Kale*, Plaintiffs' failed effort to bring their state law claims in the earlier proceeding does not alter the res judicata effect of that proceeding. Here, as in *Shaver* and *Kale*, the later suit is precluded.

CONCLUSION

WHEREFORE, based on the foregoing facts, arguments, and authorities, Respondent Venture Stores, Inc., respectfully requests that the Court deny the petition for writ of certiorari.

Respectfully submitted,

Venture Stores, Inc.

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